

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JANICE D. MCCOY,

Plaintiff,

v.

JO ANNE B. BARNHART,
Commissioner of the Social Security
Administration,

Defendant.

No. C 04-04607 CW

ORDER DENYING
DEFENDANT'S
MOTION FOR
SUMMARY JUDGMENT;
AND GRANTING
PLAINTIFF'S
MOTION TO REMAND

Plaintiff Janice McCoy has filed a motion for summary judgment or, in the alternative, remand to the Commissioner of the Social Security Administration (SSA) for further proceedings. Defendant Jo Anne Barnhart, in her capacity as Commissioner of the SSA, opposes this motion and cross moves for summary judgment. Having considered all of the papers filed by the parties, the Court DENIES Plaintiff's motion for summary judgment, DENIES Defendant's cross-

1 motion, and GRANTS Plaintiff's motion for remand.

2 BACKGROUND

3 I. Procedural History

4 Plaintiff filed applications for a period of disability,
5 disability insurance benefits (DIB) and supplemental security
6 income (SSI) benefits on February 2, 2001. The SSA denied her
7 benefit applications by notices of initial determination dated
8 August 3, 2001. No appeal was taken.

9 On January 26, 2002, Plaintiff re-applied for DIB and SSI
10 under Titles II and XVI of the Social Security Act, alleging
11 disability beginning on May 1, 2001, due to neck/upper back and
12 right ankle pain. Plaintiff's application and request for
13 reconsideration were denied on the ground that she retained the
14 ability to do her past work as a warehouse worker. On December 6,
15 2002, Plaintiff requested a hearing. A hearing was held before an
16 Administrative Law Judge (ALJ) on January 22, 2004. Plaintiff
17 appeared and was represented by counsel. A vocational expert also
18 testified at the hearing. On February 5, 2004, the ALJ issued a
19 decision finding that Plaintiff was not disabled.

20 Plaintiff filed a timely request with the Appeals Council for
21 review of the ALJ's decision, submitting additional evidence and
22 argument. On August 25, 2004, the ALJ's decision became the
23 Commissioner's final decision when the Appeals Council denied
24 Plaintiff's request for review. Thereby, Plaintiff commenced the
25 instant action for judicial review.

1 II. Factual History

2 A. Plaintiff's Age, Education and Work Experience

3 Plaintiff was born on September 19, 1956, and was forty-five
4 years old when she filed her applications for Social Security
5 disability benefits. She has a high school education and had been
6 employed as a waitress, warehouse worker, food service worker and
7 cashier.

8 Prior to filing her initial application in February, 2002,
9 Plaintiff began working as a waitress at the Home for Jewish
10 Living. (Transcript (Tr) 105, 130). She worked from January, 2002,
11 until March 31, 2003, earning a total of \$18,826.31 in 2002, which
12 qualifies as substantial gainful activity. (Tr 130). Thus, at the
13 hearing before the ALJ, Plaintiff amended the alleged onset date to
14 April 1, 2003, the day after she left her job as a waitress. (Id.)

15 B. Plaintiff's Medical History

16 On May 19, 1998, Plaintiff was allegedly injured at work when
17 she had to pull milk cartons and carry food trays up two flights of
18 stairs for two days because the elevators were not operational.
19 (Tr 136, 259). On May 11, 1999, Plaintiff was referred to the
20 office of John D. Warbritton, M.D. (Tr 134). In a letter dated
21 August 16, 1999, Dr. Warbritton observed Plaintiff had "a
22 significant grip strength loss in the right dominant hand . . . a
23 moderate limitation of neck flexion and right lateral bending and
24 rotation . . . a moderate cervical paraspinal muscle spasm, and
25 . . . a significant spasm and tightness in the muscles about the
26 right shoulder girdle." (Tr 134-35). Dr. Warbritton concluded
27 that Plaintiff experienced "permanent residuals referable to her
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1 neck and upper back which would preclude her from heavy lifting."
2 (Tr 135).

3 Plaintiff received follow-up pain management with Dr.
4 Warbritton in December, 1999. (Tr 205). She complained of right
5 elbow pain from driving and using the keyboard at work. (Id.) In
6 December, 2000, Plaintiff underwent an open reduction internal
7 fixation surgery on her right ankle, which was fitted with screws
8 and a plate. (Tr 147, 160-61). In June, 2002, Dr. Thomas Dorsey
9 performed a consultation examination at the request of the SSA.
10 (Tr 166). Dr. Dorsey observed that Plaintiff's right ankle showed
11 a "full range of motion" and that she had obtained an "excellent
12 clinical result" from the ankle surgery. (Tr 168-69). Dr. Dorsey
13 also concluded that based on his examination, Plaintiff had "no
14 impairment-related physical limitations." (Tr 169).

15 On visits to Alameda County Medical Center, Plaintiff reported
16 that she continued to experience numbness and pain in her hand,
17 arm, shoulder and knee during November and December, 2002. (Tr
18 295-97, 299). In July and August, 2003, Plaintiff complained of
19 similar symptoms. (Tr 291-94).

20 In September, 2003, Plaintiff's right knee was examined by
21 MRI. (Tr 271). The findings noted "degenerative changes of the
22 patellar articular surface," a "small cyst," a "complete rupture of
23 the anterior cruciate ligament," and a "complex tear of the
24 posterior horn and junction region of the medial meniscus . . .
25 and . . . lateral meniscus." (Id.). In December, 2003 and March,
26 2004, Plaintiff sought treatment for right knee and ankle pain.
27 (Tr 323, 326).

1 From August, 2003 to October, 2003, Plaintiff experienced
2 numbness in her right hand. (Tr 287, 289, 291, 327). Plaintiff
3 submitted the following additional evidence to the Appeals Council
4 concerning her right hand numbness: On February 17, 2004, the
5 results of an electromyographic examination (EMG) showed moderately
6 severe right carpal tunnel syndrome and right cubital tunnel
7 syndrome. (Tr 324-25). In March, 2004, Plaintiff also sought
8 treatment for right wrist pain. (Tr 323).

9 Plaintiff reported that she takes the following prescribed
10 medications: Naprosyn¹ (375 mg, twice daily), Vicodin² (500 mg,
11 four each day), and Flexeril³ (10 mg, three each day). (Tr 116).
12 Plaintiff also takes Prozac for "stress." (Tr 20).

13 Plaintiff submits two attachments to her motion which were not
14 part of the administrative record. The first document is a
15 "History and Physical Examination," dated September 30, 2004. It
16 notes the possibility of two surgeries: right wrist carpal tunnel
17 release surgery and right ankle surgery to remove hardware. Pl.'s
18 Ex. A. The second document is not dated but Plaintiff asserts that
19 it was prepared on December 29, 2004. According to this "Operative

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21 ¹ "a member of the arylacetic acid group of non-steroidal
22 anti-inflammatory drugs." Physicians' Desk Reference, 59th ed.
(PDR), 2874 (2005).

23 ² "Hydrocodone bitartrate and acetaminophen is supplied in
24 tablet form for oral administration . . . Hydrocodone is a
25 semisynthetic narcotic analgesic and antitussive with multiple
actions qualitatively similar to those of codeine. Most of these
involve the central nervous system." PDR at 526.

26 ³ "Cyclobenzaprine HCl relieves skeletal muscle spasm of local
27 origin without interfering with muscle function. It is ineffective
28 in muscle spasm due to central nervous system disease." PDR at
1930.

1 Report," Plaintiff had surgery to remove screws and a plate from
2 her right ankle. Pl.'s Ex. B. Plaintiff acknowledges that she has
3 not yet had the planned carpal tunnel release surgery.

4 C. ALJ Findings

5 At step one, the ALJ found Plaintiff has not been engaged in
6 substantial gainful activity since April 1, 2003. (Tr 21). At
7 step two, the ALJ concluded that the medical evidence showed
8 "severe" medically determinable impairments which account for some
9 degree of right knee and right ankle pain. (Tr 20). The ALJ found
10 no medically determinable explanation for Plaintiff's complaints of
11 neck and shoulder pain or numbness in her hand. (Id.). In
12 addition, the ALJ found the record insufficient to show "severe"
13 depression or other mental impairments expected to last for twelve
14 continuous months. (Id.).

15 At step three, the ALJ concluded that Plaintiff had no
16 impairments or combination of impairments meeting or equaling in
17 severity any Listing-level impairment. (Tr 22). The ALJ also
18 found that Plaintiff retained the residual functional capacity
19 (RFC)⁴ to perform a "full range of 'sedentary' work activities."⁵

20
21 ⁴ The SSA defines RFC as follows:

22 Your impairment(s), and any related symptoms, such as pain,
23 may cause physical and mental limitations that affect what you
24 can do in a work setting. Your residual functional capacity
25 is what you can still do despite your limitations. 20 C.F.R.
26 § 416.945(a)

27 ⁵ Sedentary work involves:

28 lifting no more than ten pounds at a time, and occasionally
lifting or carrying articles like docket files, ledgers and
small tools. Although a sedentary job is defined as one
which involves sitting, a certain amount of walking and

(Id.). Furthermore, the ALJ did not find Plaintiff's symptom allegations credible or reliable. At step four, the ALJ accepted the testimony of the vocational expert Dr. Gerald Belchick that Plaintiff would be unable to perform any of her past jobs. (Id.). Finally, at step five, consulting the Medical Vocational Guidelines, the ALJ concluded that considering Plaintiff's age, high school education, work experience and RFC for "sedentary" work, Plaintiff was not disabled because she could perform other substantial gainful work. (Id.).

LEGAL STANDARD

I. Overturning a Denial of Benefits

A court cannot set aside a denial of benefits unless the ALJ's findings are based upon legal error or are not supported by substantial evidence in the record as a whole. 42 U.S.C. § 405(g); Magallanes v. Bowen, 881 F.2d 747, 750 (9th Cir. 1989); Martinez v. Heckler, 807 F.2d 771, 772 (9th Cir. 1986). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Orteza v. Shalala, 50 F.3d 748, 749 (9th Cir. 1995). It is more than a scintilla but less than a preponderance. Sorenson v. Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975).

To determine whether substantial evidence exists to support the ALJ's decision, a court reviews the record as a whole, not just the evidence supporting the decision of the ALJ. Walker v.

standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met. 20 C.F.R. § 404.1567

1 Matthews, 546 F.2d 814, 818 (9th Cir. 1976). A court may not
2 affirm the ALJ's decision simply by isolating a specific quantum of
3 supporting evidence. Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir.
4 1989). In short, a court must weigh the evidence that supports the
5 Commissioner's conclusions and that which does not. Martinez, 807
6 F.2d at 772.

7 If there is substantial evidence to support the decision of
8 the ALJ, it is well-settled that the decision must be upheld even
9 when there is evidence on the other side, Hall v. Sec'y of Health,
10 Educ. & Welfare, 602 F.2d 1372, 1374 (9th Cir. 1979), or when the
11 evidence is susceptible to more than one rational interpretation,
12 Gallant v. Heckler, 753 F.2d 1450, 1453 (9th Cir. 1984). If
13 supported by substantial evidence, the findings of the ALJ as to
14 any fact will be conclusive. 42 U.S.C. § 405(g); Vidal v. Harris,
15 637 F.2d 710, 712 (9th Cir. 1981).

16 II. Establishing Disability Under the Social Security Act

17 Under the Social Security Act, "disability" means:

18 inability to engage in any substantial gainful activity by
19 reason of any medically determinable physical or mental
20 impairment which can be expected to result in death or which
has lasted or can be expected to last for a continuous period
of not less than twelve months.

21 42 U.S.C. § 423 (d) (1) (A). The impairment must be so severe that
22 the claimant "is not only unable to do his previous work but cannot
23 . . . engage in any other kind of substantial gainful work."

24 42 U.S.C. § 423(d) (2) (A). In addition, the impairment must result
25 "from anatomical, physiological, or psychological abnormalities
26 which are demonstrable by medically acceptable clinical and
27 laboratory techniques." 42 U.S.C. § 423(d) (3).

1 To determine whether a claimant is disabled within the meaning
2 of the Social Security Act, the Social Security Regulations set out
3 a five-step sequential process. Reddick v. Chater, 157 F.3d 715,
4 721 (9th Cir. 1998); Baxter v. Sullivan, 923 F.2d 1391, 1395 (9th
5 Cir. 1991); 20 C.F.R. § 404.1520 (b)-(f). The burden of proof is
6 on the claimant in steps one through four. Sanchez v. Sec'y of
7 Health & Human Servs., 812 F.2d 509, 511 (9th Cir. 1987). In step
8 one, the claimant must show that she or he is not currently engaged
9 in substantial gainful activity. 20 C.F.R. § 404.1520(b). In step
10 two, the claimant must show that he or she has a "medically severe
11 impairment or combination of impairments" that significantly limits
12 his or her ability to work. Bowen v. Yuckert, 482 U.S. 137, 140
13 (1987); Smolen v. Chater, 80 F.3d 1273, 1290 (9th Cir. 1996); 20
14 C.F.R. § 404.1520(c). If the claimant does not, he or she is not
15 disabled. Otherwise, the process continues to step three for a
16 determination of whether the impairment meets or equals a "listed"
17 impairment which the regulations acknowledge to be so severe as to
18 preclude substantial gainful activity. Yuckert, 482 U.S. at 141;
19 20 C.F.R. § 404.1520(d); 20 C.F.R. § 404, Subpt. P, App. 1. If
20 this requirement is met, the claimant is conclusively presumed
21 disabled; if not, the evaluation proceeds to step four. At step
22 four, it must be determined whether the claimant can still perform
23 "past relevant work." Yuckert, 482 U.S. at 141; 20 C.F.R.
24 § 404.1520(e). If the claimant can perform such work, he or she is
25 not disabled. If the claimant meets the burden of establishing an
26 inability to perform prior work, the burden of proof shifts to the
27 Commissioner for step five. At step five, the Commissioner must

1 show that the claimant can perform other substantial gainful work
2 that exists in the national economy. Yuckert, 482 U.S. at 141; 20
3 C.F.R. § 1520(f).

4 DISCUSSION

5 Plaintiff presents three issues for review. First, she
6 challenges the ALJ's findings at step two as not supported by
7 substantial evidence. Second, Plaintiff contends that the ALJ
8 improperly discounted her credibility. And third, Plaintiff
9 asserts that the ALJ's reliance on the Medical Vocational
10 Guidelines was improper.

11 I. Step Two Severe Impairment Determination

12 Plaintiff disputes the ALJ's finding that her neck pain,
13 shoulder pain, and numbness in her hands were not severe because
14 there was no medically determinable explanation for it. Defendant
15 responds that, although the ALJ acknowledged Plaintiff's subjective
16 complaints of pain and numbness, there was no medical evidence to
17 connect these complaints to any severe impairment. Moreover, the
18 evidence Plaintiff submitted to the Appeals Council would not have
19 changed the outcome of the case.

20 Step two requires that a claimant have one or more "severe
21 impairments that significantly limit [her] physical or mental
22 ability to conduct basic work activities." Celaya v. Halter, 332
23 F.3d 1177, 1180 (9th Cir. 2003). The step two severity
24 determination is intended to identify those claimants whose
25 impairments are so slight that they are unlikely to be found
26 disabled even when the variables of their age, education and
27 experience are taken into account. Carrao v. Shalala, 20 F.3d 943,

1 949 (9th Cir. 1994) (citing Yuckert, 482 U.S. at 153). "The step
2 two inquiry is a de minimis screening device to dispose of
3 groundless claims." Smolen, 80 F.3d at 1290. An overly stringent
4 application of the second stage criteria would violate the statute
5 because benefits would be denied to claimants who meet the
6 statutory definition of disabled. Carrao, 20 F.3d at 949. A
7 finding that the impairment is "not severe" must be "clearly
8 established by medical evidence;" if it is not clearly established,
9 the sequential evaluation process must be continued. SSR 85-28.

10 To determine whether the ALJ's finding is supported by
11 substantial evidence, the Court considers the record as a whole.
12 Walker, 546 F.2d at 818. The Court finds a medically determinable
13 explanation in the record for Plaintiff's complaints of neck and
14 shoulder pain and numbness in her hand. In May, 1999, Dr.
15 Warbritton observed a significant grip strength loss in the right
16 hand and concluded that there were permanent residuals in
17 Plaintiff's upper back and neck which would preclude her from heavy
18 lifting. (Tr 134-35). Notably, the Plaintiff sought treatment on
19 several occasions for these symptoms in the years following Dr.
20 Warbritton's diagnosis. (Tr 287, 289, 291-94, 295-97, 299, 323-25,
21 327). Furthermore, the February 17, 2004 EMG evidence Plaintiff
22 submitted to the Appeals Council does show moderately severe carpal
23 tunnel syndrome and right cubital tunnel syndrome.

24 Plaintiff also submits new evidence for this Court to review
25 and requests that, on remand, Defendant be instructed to reconsider
26 the ALJ's findings in light of this evidence. A federal court may
27 remand to the Commissioner of SSA "upon a showing that there is new
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1 evidence which is material and that there is good cause for the
2 failure to incorporate such evidence into the record in a prior
3 proceeding. . . ." 42 U.S.C. § 405(g) (citations omitted); see
4 Allen v. Sec'y of Health and Human Servs., 726 F.2d 1470, 1473 (9th
5 Cir. 1984).

6 Plaintiff introduces two documents prepared by physicians.
7 The first document is a "History and Physical Examination" dated
8 September 30, 2004, proposing surgery to relieve Plaintiff's
9 symptoms of carpal tunnel syndrome and to remove hardware causing
10 her pain in her right ankle. The second document is an "Operative
11 Report" dated December 29, 2004, describing the surgery removing
12 hardware from Plaintiff's ankle. Because this evidence was
13 unavailable at the time of the hearing in February, 2004, good
14 cause is shown. Clem v. Sullivan, 894 F.2d 328, 330 (9th Cir.
15 1990); Embrey v. Bowen, 849 F.2d 418, 423-24 (9th Cir. 1988).

16 The remaining inquiry is whether this new evidence is
17 material. New evidence is material if it "bears directly and
18 substantially on the matter in dispute" and if "there is a
19 reasonable possibility that the new evidence would have changed the
20 outcome of the . . . determination.'" Booz v. Sec'y of Health &
21 Human Servs., 734 F.2d 1378, 1380-81 (9th Cir. 1984) (quoting
22 Dorsey v. Heckler, 702 F.2d 597, 604-05 (5th Cir. 1983) (internal
23 quotation marks and citations omitted).

24 The Operative Report describing surgery on Plaintiff's right
25 ankle is not material. Although the evidence raises the inference
26 that Plaintiff's condition has not improved, it does not expressly
27 state or necessarily imply that pain in the right ankle has

1 increased. To the contrary, the purpose of the surgery was to
2 relieve the pain caused by the hardware. Moreover, the ALJ found
3 Plaintiff had a severe impairment in her right ankle but concluded
4 nonetheless that she could perform other substantial gainful
5 activity. Thus, the Operative Report would not have changed the
6 outcome of the case.

7 The medical evidence proposing surgery to relieve Plaintiff's
8 symptoms caused by carpal tunnel syndrome, however, bears directly
9 and substantially on the severity of Plaintiff's pain and numbness
10 in her right arm and hand, a matter clearly in dispute. Defendant
11 argues that the EMG evidence was properly rejected by the Appeals
12 Council because it would not have changed the ALJ's final
13 determination, i.e., that Plaintiff could perform sedentary work.
14 Yet, the ALJ did not consider, nor did Defendant address, the new
15 evidence of the recommended wrist surgery. Moreover, that evidence
16 belies the ALJ's reasoning that the impairments were not severe
17 because Plaintiff was only prescribed conservative treatments; the
18 evidence suggests that surgery has been prescribed. Finally, given
19 the state of the record, the new evidence is relevant regarding the
20 disabling effects of the carpal tunnel syndrome, particularly
21 whether the condition precludes or diminishes Plaintiff's ability
22 to perform sedentary work.⁶

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24 ⁶ "Most unskilled sedentary jobs require good use of both
25 hands and the fingers; i.e., bilateral manual dexterity for
26 repetitive hand-finger actions." Social Security Ruling 96-9p,
27 Determining Capability to Do Other Work -- Implications of a
28 Residual Functional Capacity for Less than a Full Range of
Sedentary Work, 61 Fed. Reg. 34,478, 34,482 (July 2, 1996). "Any
significant manipulative limitation of an individual's ability to
handle and work with small objects with both hands will result in a

1 Therefore, the Court remands to Defendant to consider at step
2 two the new evidence and any evidence Plaintiff has since acquired
3 concerning any functional limitations arising from her right carpal
4 tunnel and right cubital tunnel syndromes. If these impairments
5 are determined at step two to be severe, Defendant must reconsider
6 the prior findings at step three through five in that light.

7 II. Credibility

8 Plaintiff contends that the ALJ's credibility findings at step
9 three concerning her knee pain and limited use of her hand were not
10 sufficiently specific and that he did not provide clear and
11 convincing reasons for discounting her testimony. Defendant cites
12 the ALJ's discussion of inconsistencies in the record, Plaintiff's
13 own self-reported physical abilities and Plaintiff's demeanor at
14 the hearing to show that the ALJ's findings were specific and
15 consistent with substantial evidence.

16 In Cotton v. Bowen, 799 F.2d 1403 (9th Cir. 1986), the Ninth
17 Circuit developed a threshold test to determine the credibility of
18 a claimant's subjective symptom testimony. Under Cotton, a
19 claimant "must produce objective medical evidence of an underlying
20 impairment 'which could reasonably be expected to produce the pain
21 or other symptoms alleged.'" Bunnell v. Sullivan, 947 F.2d 341,
22 344 (9th Cir. 1991) (en banc) (quoting Cotton, 799 F.2d at 1407-
23 08); see also Smolen, 80 F.3d at 1282. Cotton requires "only that
24 the causal relationship be a reasonable inference, not a medically
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26 _____
27 significant erosion of the unskilled sedentary occupational base."
28 Id.

1 proven phenomenon." Smolen, 80 F.3d at 1282. Thus, a claimant is
2 not required to produce objective medical evidence of the pain
3 itself or its severity. Id. (citing Bunnell, 947 F.2d at 347-48).
4 "It is improper as a matter of law for an ALJ to discredit excess
5 pain testimony solely on the ground that it is not fully
6 corroborated by objective medical findings." Cotton, 799 F.2d at
7 1407; Fair v. Bowen, 885 F.2d 597, 601 (9th Cir. 1989).

8 Once a claimant meets the Cotton test, "the Commissioner may
9 not discredit the claimant's testimony as to subjective symptoms
10 merely because they are unsupportable by objective evidence.
11 Unless there is affirmative evidence showing that the claimant is
12 malingering, the Commissioner's reason for rejecting the claimant's
13 testimony must be 'clear and convincing.'" Lester v. Chater, 81
14 F.3d 821, 834 (9th Cir. 1995) (quoting Swenson v. Sullivan, 876
15 F.2d 683, 687 (9th Cir. 1989)); Smolen, 80 F.3d at 1281. In
16 determining whether a plaintiff's testimony concerning the severity
17 of her symptoms is credible, the ALJ may properly consider:
18 (1) ordinary techniques of credibility evaluation, such as the
19 plaintiff's reputation for lying, prior inconsistent statements
20 concerning the symptoms, and other testimony by the plaintiff that
21 appears less than candid; (2) unexplained or inadequately explained
22 failure to seek treatment or to follow a prescribed course of
23 treatment; and (3) the plaintiff's daily activities. Smolen, 80
24 F.3d at 1273.

25
26 Defendant argues that the ALJ properly discredited Plaintiff's
27 knee pain testimony because she reported that she stopped working
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1 on March 31, 2003 due to pain in her knee and ankle, yet her
2 reports of severe knee pain did not actually begin until about July
3 21, 2003, four months after she stopped working. (Tr 21, 293,
4 335). However, the record reflects that Plaintiff began reporting
5 pain in her right knee as early as December, 2002. (Tr 296).
6 Furthermore, Plaintiff testified at the hearing that, before she
7 stopped working, her knee pain was so severe that she had to take
8 many sick days and would hide in the bathroom at work crying
9 because of the pain. (Tr 334-35, 344).

10 Defendant also contends that the ALJ's credibility
11 determination was correct based on the fact that Plaintiff's
12 physicians only prescribed conservative treatment for the knee
13 pain. Defendant cites Meanel v. Apfel for the proposition that
14 subjective pain complaints can be properly discredited where a
15 claimant receives conservative treatment. 172 F.3d 1111, 1113 (9th
16 Cir. 1999). Unlike the claimant in Meanel, however, Plaintiff
17 passes the threshold test articulated in Cotton. Here, the ALJ
18 found objective medical evidence of a severe impairment, which
19 could account for some degree of pain in Plaintiff's right knee.
20 (Tr 20). Moreover, the ALJ in Meanel rejected the claimant's
21 testimony because (1) her doctor failed to prescribe, and the
22 claimant failed to seek, medical treatment; (2) the claimant could
23 not explain the discrepancy between her pain testimony and the
24 conservative treatment she had received; and (3) the claimant's
25 testimony was otherwise inconsistent with her own physician's
26 findings. 172 F.3d at 1114. The fact that the claimant received
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1 conservative treatment was a factor in the Meanel court's analysis
2 but the court did not suggest that this fact alone was dispositive.
3 Similarly, Plaintiff's conservative treatments may have been an
4 appropriate factor in the ALJ's credibility determination but this
5 factor alone does not provide a clear and convincing reason for
6 rejecting Plaintiff's testimony.

7 Defendant also argues that there is affirmative evidence that
8 Plaintiff was malingering concerning whether the pain limited her
9 physical abilities. The ALJ noted that Plaintiff admitted she
10 could cook, clean, shop with her son, drive to her appointments,
11 when necessary, and climb a flight of thirty stairs to her
12 apartment, when necessary. (Tr 339, 346-47). Defendant contends
13 that these admissions were inconsistent with Plaintiff's assertion
14 that she could not perform sedentary work and, thus, provided
15 further support for the ALJ's credibility finding. However,
16 Plaintiff correctly points out that the ALJ failed to acknowledge
17 the qualifying statements Plaintiff made regarding these
18 admissions. Plaintiff testified that she tried to do some
19 housework and cook "a little bit, with [her son's] help and his
20 daughter" but that her son "does the majority of work in the
21 house." (Tr 339). Plaintiff also stated that her son helps her
22 shop and that she must sit in the car after picking the items out
23 because she can't stand long in the check-out lines. (Tr 346-47).
24 Plaintiff admitted to driving a car but stated that she had to
25 learn to drive with her left foot and also that her son takes her
26 to her doctor's appointments the "majority of the time." (Tr 346).
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1 Furthermore, Plaintiff testified that she could climb up and down a
2 flight of stairs but also stated that the stairs act as a deterrent
3 and the reason she spends a "majority of the time . . . at home."
4 (Tr 347).

5 Finally, Defendant argues that the ALJ properly discredited
6 Plaintiff's testimony because of her demeanor at the hearing. The
7 ALJ described Plaintiff as presenting with "great elaboration of
8 her aches and pains, with multiple moans and groans." (Tr 21).
9 Defendant contends that the ALJ was entitled to rely on his
10 observations of Plaintiff in finding her not credible over all.
11 However, "the ALJ may not rely on his own observations of the
12 claimant at the hearing as the sole reason for rejecting the
13 claimant's complaints." Tonapetyan v. Halter, 242 F.3d 1144, 1148
14 (9th Cir. 2001) (citing Fair, 885 F.2d at 602). Although the ALJ
15 did not rely solely on observations of Plaintiff's demeanor at the
16 hearing, the additional fact that Plaintiff only received
17 conservative treatment for her pain does not suffice to amount to
18 clear or convincing reasons to discount Plaintiff's credibility.

19 Therefore, the Court instructs Defendant on remand to provide
20 clear and convincing reasons for rejecting Plaintiff's testimony of
21 her physical limitations arising from pain in her right knee, or to
22 give her testimony due weight.

23 III. Medical Vocational Guildelines

24 Plaintiff argues that the ALJ's use of the Medical-Vocational
25 Guildelines (Grids) was improper because Plaintiff has a
26 significant limitation from a severe non-exertional impairment in
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1 her right arm and hand. Defendant contends that the ALJ's use of
2 the Grids was proper because substantial evidence supported a
3 finding that Plaintiff had the RFC to perform sedentary work.

4 The Grids are administrative tools that the Commissioner may
5 use at step five of the disability evaluation. Burkhart v. Bowen,
6 856 F.2d 1335, 1340 (9th Cir. 1988). Based on age, education, work
7 experience, and "exertional capacity," the Grids determine the
8 employability of claimants with "substantially uniform levels of
9 impairment." Id.; see also 20 C.F.R. pt. 404, subpt. P, app. 2.
10 However, the ALJ may rely on the Grids only when they "accurately
11 and completely describe the claimant's abilities and limitations."
12 Burkhart, 856 F.2d at 1340; see also Tackett v. Apfel, 180 F.3d
13 1094, 1102 (9th Cir. 1999). If a claimant has an impairment that
14 limits his or her ability to work without directly affecting his or
15 her strength, the claimant is said to have non-exertional (not
16 strength-related) limitations that are not covered by the Grids.
17 20 C.F.R., pt. 404, subpt. P., app. 2 § 200.00(d),(e). When a
18 claimant suffers from non-exertional impairments that are
19 "sufficiently severe" to limit significantly the range of work
20 permitted by his or her exertional abilities, the Grids are
21 inapplicable. Tackett, 180 F.3d at 1102 (citing Desrosiers v.
22 Sec'y of Health and Human Servs., 846 F.2d 573, 577 (9th Cir.
23 1988)). In such instances, the ALJ must consider the testimony of
24 a vocational expert and identify specific jobs that are within the
25 claimant's capabilities. Burkhart, 856 F.2d at 1340. Here, the
26 ALJ accepted the vocational expert's testimony that Plaintiff could
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1 not perform her past work but did not question him regarding the
2 range of work or specific jobs Plaintiff could perform within her
3 abilities. Rather, the ALJ consulted the Grids directly.

4 Plaintiff argues that medical and other evidence shows the
5 existence of a significant impairment in her right arm and hand
6 causing non-exertional limitations. Given the Court's decision to
7 remand on whether Plaintiff's right carpal tunnel and cubital
8 tunnel syndromes constitute a severe impairment, the Court cannot
9 determine whether the use of the Grids is proper. However, if, on
10 remand, Defendant finds Plaintiff's carpal tunnel and cubital
11 tunnel syndromes constitute a severe impairment causing non-
12 exertional limitations "that significantly limit the range of work
13 permitted by [her] exertional abilities," then use of the Grids
14 would be improper. Desrosiers, 846 F.2d at 577 (citations
15 omitted).

16 CONCLUSION

17 For the foregoing reasons, the Court denies Plaintiff's and
18 Defendant's cross-motions for summary judgment (Docket No. 18 and
19 21) and grants Plaintiff's motion to remand (Docket No. 18) for
20 further proceedings as instructed.

21 IT IS SO ORDERED.

22 Dated: 10/27/05



23
24 CLAUDIA WILKEN
25 United States District Judge
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United States District Court
For the Northern District of California

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